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United States v. Madchetti and Alfred A. Knopf, Inc. v. Colby: Secrecy 2; First Amendment 0

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UNITED STATES v. MARCHETTI AND ALFRED A. KNOPF, INC. v. COLBY: SECRECY 2; FIRST AMENDMENT 0

*By David H. Ryan**

Just ten months after the Supreme Court denied the federal government an injunction that would have prohibited the further publication of the Pentagon Papers by *The New York Times* and *The Washington Post*,[1] government attorneys again went to court to restrain publication—this time with more success. In this case, the Central Intelligence Agency (CIA) sought an injunction to prevent former agent Victor Marchetti from publishing a book based on his experiences in the CIA.

Invoking a secrecy agreement which he had signed when he joined the agency,[2] the trial court ordered Marchetti to submit the book to the CIA for authorization prior to publication. On appeal the order was modified to permit CIA authorization to be withheld only for fac-

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* Member, third year class.

1. New York Times Co. v. United States, 403 U.S. 713 (1971).

2. The relevant provisions of the agreement are:

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of information relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives. . . ." United States v. Marchetti, 466 F.2d 1309, 1312 n.1 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

tual items relating to classified documents obtained while Marchetti was employed by the CIA.[3] The CIA subsequently refused to authorize 339 items, comprising approximately twenty per cent of the book.[4] Marchetti, his co-author, and their publisher, Alfred A. Knopf Inc., filed suit to restore the 339 items. The CIA later voluntarily released half of the previously unauthorized material. Thereafter, *The CIA and the Cult of Intelligence* was published with 168 items still deleted. Nearly all of these deletions were upheld in the second suit.[5]

Although these cases presented an apparent conflict between the First Amendment rights of freedom of speech and the press and the governmental interest of national security, this issue was circumvented by the court's enforcement of the secrecy agreement under traditional contract theory. After a review of the *Marchetti* and *Knopf* cases, this note will analyze the standard that has emerged from those cases in which the government has sought to condition employment on the surrender of a constitutionally protected right. The standards of the First Amendment will be reviewed, emphasizing the role of judicial review in prior restraint cases. The *New York Times* decision will then be analyzed, including some assumptions and conclusions that follow from the Court's denial of the injunction that would have halted publication of the Pentagon Papers. Finally, this note will balance the principles derived from *New York Times* with the contract theory applied in *Marchetti* and *Knopf* in an attempt to formulate a standard for the enforcement of secrecy agreements that will protect both the need for secrecy and First Amendment rights.

I. The Cases

A. United States v. Marchetti

Victor Marchetti was an employee of the CIA from 1955 to 1969, ultimately attaining the post of executive assistant to the deputy director. In 1969, Marchetti resigned from the agency because he questioned the CIA's role in foreign affairs and he feared the CIA's possible involvement in domestic activities.[6] Two years later he expressed

3. *Id.* at 1317-18.

4. V. MARCHETTI AND J. MARKS, THE CIA AND THE CULT OF INTELLIGENCE xxv (1974) [hereinafter cited as MARCHETTI AND MARKS].

5. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

6. *See* Otis, *Spooking the Spooks: The Victor Marchetti Story*, RAMPARTS, Dec., 1972, at 8; Delong, *A Former Staff Officer Criticizes CIA Activities*, U.S. NEWS AND WORLD REPORTS, Oct. 11, 1971, at 78. For a detailed report of abuses by United States intelligence agencies, see FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, 94th Cong., 2d Sess. (1976) [hereinafter cited as SELECT COMMITTEE REPORT].

criticisms of the agency in a novel[7] and a magazine article,[8] as well as in several radio and television interviews. Alarmed by the revelations in those writings, interviews, a planned *Esquire* article, and an outline of a proposed non-fiction book about the CIA that Marchetti had circulated to publishers, the CIA sought an injunction prohibiting publication of the *Esquire* article and the non-fiction book unless Marchetti complied with the secrecy agreement he had signed.[9] The complaint alleged that disclosure of the information in the *Esquire* article and the outline for the book would violate the secrecy agreement and would result in "grave and irreparable damage to the interests of the United States."[10]

1. *The District Court*

After an *ex parte* hearing, Federal District Judge Albert V. Bryan issued a temporary restraining order directing Marchetti to submit to the CIA any manuscript concerning the agency thirty days prior to publication.[11] Judge Bryan found that:

> [i]mmediate and irreparable injury, loss or damage will result to the plaintiff before a hearing can be had on the plaintiff's motion for a preliminary injunction, in that defendant Victor L. Marchetti . . . has violated the terms and conditions of his secrecy agreements with the Central Intelligence Agency by disclosing on numerous occasions classified information relating to intelligence sources and methods, which information was entrusted to the defendant in confidence in connection with his employment . . . .[12]

Marchetti moved to dissolve the temporary restraining order, filing an affidavit that stated:

> My years of experience in the Agency have led me to believe that the CIA and United States intelligence have grown beyond the actual needs of the nation. There is a great deal of redundancy, waste and inefficiency in the intelligence business today, and many of the operations undertaken by the CIA and other intelligence agencies are counter-productive and harmful to the nation. Such activities, unrelated to the national security, would not be tolerated by an informed public and an informed Congress. I believe that the CIA's action in this case has been taken, not to protect national security, but to prevent embarassment to the Agency which would

7. V. MARCHETTI, THE ROPE DANCER (1971).

8. Marchetti, *CIA: The President's Loyal Tool*, THE NATION, April 3, 1972, at 430.

9. Brief for Appellant at 2, United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).

10. *Id.* at 6.

11. Temporary Restraining Order at 3, United States v. Marchetti (E.D. Va., Apr. 18, 1972).

12. *Id.* at 1.

result from public knowledge of the activities and policies I have just mentioned.[13]

District Judge Bryan denied Marchetti's motion to dissolve the temporary restraining order. At the hearing on the permanent injunction, the CIA presented two witnesses.[14] During cross-examination of one of these witnesses Marchetti questioned the basis for the witness's conclusion that disclosure of the items contained in the *Esquire* article would injure national security. The CIA objected to this questioning. In sustaining the objection, District Judge Bryan rejected the defendant's First Amendment claims.[15] This ruling obviated the necessity for the CIA to show immediate and irreparable injury to national security despite the fact that this was the basis of two of the complaint's allegations.

The adverse ruling on the First Amendment claims eviscerated Marchetti's case. He had been prepared to call four crucial witnesses—three university professors[16] and Morton Halperin, former deputy assistant secretary of defense and subsequently senior staff member of the National Security Council—who were to testify that neither the *Esquire* article nor the outline of the proposed book included any information that would jeopardize national security.[17] When District Judge Bryan precluded Marchetti's First Amendment claims their testimony became irrelevant; however, it was proferred to preserve the issue for appeal.

District Judge Bryan issued a permanent injunction requiring Marchetti to submit the manuscript to the CIA prior to publication, stating:

> [T]he contract takes the case out of the scope of the First Amendment; and to the extent the First Amendment *is* involved, the contract constitutes a waiver of the defendant's rights thereunder. It is these documents that the Court feels distinguish this case from *New York Times* [sic] *v. United States*, 403 U.S. 713 (1971), and render it no more than a usual dispute between an employer regarding the revelation of information obtained by that employee during his employment. Consequently, *there is no prior restraint*

13. Brief for Appellant at 8, United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).

14. The CIA's witnesses were Thomas Karamessines, then a deputy director of the CIA, and Howard J. Osborn, CIA director of security. *Id.* at 6, 11, 13. Most of their testimony was taken *in camera*, and has been sealed. *Id.* at 11.

15. *Id.*

16. The professors were Abram Chayes, professor at Harvard Law School and former legal advisor to the Department of State; Richard Falk, professor of international law at Princeton University; and Paul Blackstock, of the School of International Affairs, University of South Carolina and an expert on intelligence organizations. *Id.* at 12-13.

17. All four of these experts were given security clearances that enabled them to study the evidence presented. *Id.* at 9 (footnote).

> and no such heavy burden on the United States to show irreparable damage to the country as was imposed by the *New York Times*.[18]

2. *The Court of Appeals*

The Fourth Circuit Court of Appeals upheld the injunction, but limited its scope to items involving classified documents in accordance with the provisions of the secrecy agreement.[19] Writing for the court, Chief Circuit Judge Clement Haynsworth recognized that Marchetti did have First Amendment rights, which he summarized as follows:

> We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.[20]

Thus the inapplicability of the First Amendment resulted from the way in which the contract was narrowly drawn to protect only classified information. The court concluded that because Marchetti would not have learned this classified information had he not signed the agreement, the agreement should be enforced to protect that information.[21]

Protection of classified information is essential because protection against foreign threats is an extremely important interest. Consequently, the protections of the Bill of Rights must yield to national security interests in some instances. This was recognized by the Supreme Court in dicta in *Near v. Minnesota*,[22] where the Court spoke of the government's right to censor publication of ships' sailing dates during times of war. Thus while the First Amendment protects comment on the conduct of foreign affairs, when that speech becomes "inconsistent with the national interest" it may be suppressed.[23]

Because the conduct of foreign affairs has been entrusted to the executive branch, the means of protecting secrecy also rest with the executive. In several cases the Supreme Court has recognized in dicta the validity of executive measures protecting secret information.[24] In

18. *Id.* at 15.
19. United States v. Marchetti, 466 F.2d 1309, 1317-18 (4th Cir. 1972).
20. *Id.* at 1313.
21. *Id.* at 1316-17.
22. 283 U.S. 697, 716 (1931).
23. United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir. 1972).
24. *See, e.g.*, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); E.W. Bliss Co. v. United States, 248 U.S. 37 (1918).

addition, the legislative branch has indicated its support for such measures by enacting criminal codes to protect the executive's classification system. Referring to such criminal codes, the circuit court in *Marchetti* stated:

> One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course.[25]

Because protection of national security is of paramount importance and because criminal sanctions would operate only after the release of the information, the court concluded that the government should have a means by which it could prevent those persons holding classified material from releasing it. Thus, secrecy agreements were held to be a reasonable means for the government to protect its internal secrets.[26]

Having found the secrecy agreement enforceable, the court then turned to an examination of Marchetti's rights:

> Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.
>
> Thus Marchetti retains the right to speak and write about the CIA and its operation, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.[27]

Furthermore, the court acknowledged that because it was "dealing with a prior restraint upon speech," Marchetti's First Amendment rights allowed him to seek judicial review if the CIA restrained publication of any material.[28] Such judicial review, however, would be limited to two questions: whether the information that Marchetti sought to reveal was classified, and, if so, whether the classified material had already come into the public domain.[29]

The court offered two reasons for declining to review the classified materials. First, the classification system is an executive function

25. 466 F.2d at 1317 (citation omitted).
26. *Id.* at 1316.
27. *Id.* at 1317.
28. *Id.*
29. *Id.* at 1318.

under the executive power to conduct foreign affairs and the judicial branch has generally declined to review the executive's foreign affairs activities. Consequently, as an executive prerogative, the operation of the classification system would not be judicially reviewable.[30] Second, the court believed that the judiciary lacks sufficient information to determine which materials would be harmful if disclosed. Chief Judge Haynsworth stated:

> There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trival to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.[31]

In his concurrence, Circuit Judge Craven agreed with the majority except that he did not share the majority view denying judicial review of executive classifications. Citing increased emphasis on the public's right to know,[32] he would have established a presumption of reasonableness for all classifications of documents. This presumption would impose the burden of proving the unreasonableness of the classification on the one assailing it. This burden could be met only by clear and convincing evidence that the classification was arbitrary and capricious.[33]

B. Alfred A. Knopf, Inc. v. Colby

Despite the legal setback occasioned by the *Marchetti* decision, Marchetti started to write the book.[34] John Marks, a former State Department official, joined him as a co-author. Upon completion of the book in late 1973, they gave a copy of the manuscript to the CIA for review. The agency withheld authorization as to 339 items. Alfred A. Knopf, Inc., Marchetti, and Marks filed suit to have the deletions restored. The plaintiffs contended that the items deleted by the CIA were not in fact classified, claimed that some of the items were in the public domain, and preserved their First Amendment claim by asserting that the information would not cause immediate and irreparable damage to national security.[35] Before the case came on for hearing,

30. *Id.* at 1317.
31. *Id.* at 1318.
32. *Id.* (Craven, J., concurring).
33. *Id.*
34. The planned *Esquire* article has apparently never been published.
35. Petitioner's Brief for Certiorari at 12-13, Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975).

the CIA made several releases of previously unauthorized items, so that only 168 items remained deleted.[36]

1. *The District Court*

At the hearing on Marchetti's suit to have the deleted material returned, four deputy directors of the CIA testified that they had read the manuscript and had noted parts that they felt revealed classified information. Other staff members then researched those items, and found classified documents that contained the information included in the manuscript. Thus the deputy directors determined that the 168 items were indeed related to classified documents, although they were unable to say when these documents were classified or by whom.[37] The court again summarily rejected the plaintiffs' challenge to the reasonableness of the classification.[38]

Because none of the deputy directors had personally classified the information, and because they did not know when the information had been classified, District Judge Bryan determined that this method of reviewing and assessing the contents of the manuscript was too imprecise—in effect, it would be an ad hoc classification of that material by those deputy directors.[39] The court of appeals had held in *Marchetti* that the employee secrecy agreement applied only to classified information obtained by Marchetti during the term of his employment. District Judge Bryan therefore concluded that the CIA had not shown that the materials had been classified during Marchetti's employment, and the agreement, therefore, was not necessarily applicable.[40]

Later in the hearing, the CIA produced certain documents with classifications stamped upon them.[41] These documents had been reproduced with all but the relevant portions blocked out, often with only a paragraph or a sentence remaining. Because large parts of the docu-

36. The court stated that the first release was of 114 items, the second of 29 items, and the third of 57 items, totaling 200 items released. The court stated, however, that the total number of unreleased items was 168. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1365 (4th Cir. 1975). Subtracting the 168 contested items from the 339 items originally deleted leaves 171 items released, not 200, as the addition of the stated number of releases would indicate.

37. *Id.* at 1365-66.

38. Petitioner's Brief for Certiorari at 14, Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975).

39. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1365-66 (4th Cir. 1975).

40. *Id.* at 1366.

41. The decision of the court of appeals states that most of the classifications were "Top Secret." *Id.* at 1366. Counsel for the plaintiffs claimed that only 22 of the government's 103 exhibits were marked "Top Secret" while most were "Secret" and some were "Confidential." Petitioner's Brief for Certiorari at 20, Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975).

ments were blocked out, the court held that there had been no showing that the material remaining on the documents was the cause of the document's classifications.[42] Therefore, the court held that the CIA's extracted materials met the *Marchetti* standard for only 26 of the 168 items.[43] As to the remaining items, District Judge Bryan acknowledged that the deputy directors' testimony indicated that the material was "sensitive." Nevertheless, he held that this determination was insufficient because the CIA had not shown that the information sought to be withheld was actually the information which had caused the document to be classified.

Both sides appealed the decision—Knopf to obtain release of the remaining 26 items, the CIA to restore the 142 items released by the district court. When Judge Bryan stayed execution of his judgment pending appeal, Knopf decided to publish the book leaving out all 168 disputed items.[44]

2. *The Court of Appeals*

Chief Circuit Judge Haynsworth again wrote the opinion for the Fourth Circuit. The court stated that the *Marchetti* opinion must have misled the district court into imposing an unreasonable burden on the CIA of proving proper classification.[45] The court first noted that after *Marchetti* was decided an amendment to the Freedom of Information Act[46] was enacted imposing a stricter standard for the withholding of information. The act itself provided for disclosure of certain previously protected information. The amendment, however, specifically exempted from disclosure nine types of information, including matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."[47] In addition, the amendment provides for *in camera* review of the materials in the judge's discretion to determine whether they fall within the exemption. The agency has the burden of showing that the materials indeed fall within the exemption.[48]

42. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1366 (4th Cir. 1975).

43. *Id.* The judge's belief that concrete proof of classification was necessary arose partly from the testimony of Dr. Halperin. MARCHETTI AND MARKS, *supra* note 4, at xxvi.

44. MARCHETTI AND MARKS, *supra* note 4, at xxvi.

45. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975).

46. 5 U.S.C. §§ 552, 552a (Supp. V, 1975), *amending* 5 U.S.C. § 552 (1970).

47. 5 U.S.C. § 552(b)(1)(A) (Supp. V, 1975).

48. 5 U.S.C. § 552(a)(4)(B) (Supp. V, 1975). This provision was drafted to negate the decision in Environmental Protection Agency v. Mink, 410 U.S. 73 (1972), which held that executive decisions respecting the classifying of information are not subject to judicial review.

As a result of the new legislation, unless the agency can show that the material was properly classified under an executive order, it must be released under the provisions of the Freedom of Information Act. Consequently the court found that any material obtainable under the Freedom of Information Act could no longer come under the provisions of the secrecy agreement because that information could so easily become a part of the public domain.[49] Therefore, the CIA would have to prove that the materials were classifiable and properly classified under an executive order.

The court also recognized that Congress has provided that the director of the CIA should protect secret information,[50] and that Executive Order No. 11652[51] established a classification system that the CIA used to protect sensitive information.[52] The court noted that it had examined some of the 142 deletions, and, since some of the deletions related to intelligence information vital to national security, such matters would "seem clearly to be classifiable under the authorization of the Executive Order. . . ."[53] Consequently, because the CIA's classification system was properly established pursuant to Executive Order No. 11652, materials classified thereunder would be exempt from disclosure.

Then, turning to the question of whether the information was properly classified, Chief Judge Haynsworth stated:

> There is a presumption of regularity in the performance by a public official of his public duty. "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." That presumption leaves no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the "Top Secret" legend on the document. This is so whether or not the document contains or may contain other information which should have been classified in the same degree. Under the prevailing practice of classifying a document in accordance with the most sensitive information it contains, the presumption, in the absence of affirmative proof to the contrary, requires the conclusion that all information within it, required by the Executive Order to be classified, was classified when the legend was affixed to the document, even though the particular bit of relevant information, alone, may be properly classified only in a lower degree than the document's classification. In short, the government was required to show no more than that each deletion item disclosed information which was required to be classified in

49. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975).
50. 50 U.S.C. § 403(d)(3) (1970).
51. 3 C.F.R. § 339 (1974).
52. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367-68 (4th Cir. 1975).
53. *Id.* at 1368.

> any degree and which was contained in a document bearing a classification stamp.[54]

As a result of this presumption the CIA's presentation of the classified documents was sufficient proof that all the classifiable material therein was "properly classified" despite the blocked out areas, even though the specific item in question would be properly classified only in a lower classification. Furthermore, the presumption also was sufficient to justify an assumption that these documents were classified at the time of the operation. Thus the CIA did not have to meet the burden of proving that the documents were classified prior to the time Marchetti left the agency.[55]

The court stated that it was not necessary for the CIA to disclose the full contents of the documents because of the risk involved, adding that courts are ill-equipped to provide the security necessary for highly sensitive material.[56] The court also noted that the Freedom of Information Act states that an *in camera* inspection is to be at the judge's discretion, so that testimony or affidavits could replace the inspection.[57] The court concluded that all that need be shown is that the material was classifiable and was in a classified document.[58] Furthermore, the court stated that Marchetti's claim that the government had to show immediate and irreparable damage was irrelevant to the present injunction because Marchetti "effectively relinquished his First Amendment rights" by signing the secrecy agreement.[59]

Finally, the court turned to the issue of whether the CIA could withhold authorization for items that had been reported in other articles but had not been publicly disclosed or confirmed by the CIA. The court found the withholding of authorization proper in such situations because such information was not properly part of the public domain due to its speculative nature. To permit comment on that which existed only as speculation might give credence to a report that would otherwise be dismissed as a rumor. A second reason noted by the court was that when Marks was asked whether he was the source of information of the other reports he declined to answer on Fifth Amendment grounds,[60] thus presenting the possibility that Marks was the source of the leaks.

54. *Id.* (citation omitted).

55. *Id.* at 1369.

56. *Id.*

57. *Id.*

58. The court recognized that Executive Order No. 11652 established the National Security Council as a monitor of that order's classification system. The order also established an interagency review committee to make decisions about declassification. The court suggested that this administrative remedy would be far more effective than judicial review of the propriety of classifications and declassifications. *Id.* at 1369-70.

59. *Id.* at 1370.

60. *Id.*

Having determined that the lower court placed too great a burden on the CIA by requiring it to show that the material it sought to delete had been classified without properly acknowledging the blocked out documents, the court of appeals reversed the holding of the lower court to the extent that it had released part of the deleted material. The Supreme Court denied Knopf's petition for certiorari.[61]

II. The Contract

> With the sweep of a rubber stamp labeled "top secret" the executive department seeks to abridge the freedom of the press. It has offered no more. We are asked to turn our backs on the First Amendment simply because certain officials have labeled material as unfit for the American people and the people of the world. Surely we must demand more. To allow a government to suppress free speech simply through a system of bureaucratic classification would sell our heritage far, far too cheaply.[62]

With these words, Circuit Judge J. Skelly Wright dissented from the decision that upheld a district court's injunction against further publication of the Pentagon Papers. At first, Judge Wright's words seem applicable to the *Marchetti* case, but in *Marchetti* the government did offer more—the secrecy agreement. Because of this agreement, the court of appeals upheld the injunction without applying either the standard of "direct, immediate and irreparable damage to our Nation or its people,"[63] as the Court required in *New York Times*, or the standard of "injury to the United States" found in criminal statutes.[64]

The contract, as interpreted by the court of appeals, had four major provisions: (1) it required Marchetti to submit the manuscript to the CIA for authorization; (2) it allowed the CIA to withhold authorization for information contained in classified documents; (3) it forced Marchetti to seek judicial review of CIA determinations to withhold authorization; and (4) it permitted review only to the extent of compelling the CIA to present classified documents containing references to the information in question. Absent the agreement, it seems unlikely that the CIA could have compelled Marchetti to comply with any of these procedures.[65]

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61. 421 U.S. 992 (1975).

62. United States v. Washington Post Co., 446 F.2d 1322, 1326 (D.C. Cir.) (Wright, J., dissenting), *rev'd sub nom.* New York Times Co. v. United States, 403 U.S. 713 (1971).

63. New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

64. *E.g.*, 18 U.S.C. § 793(d) (1970); 18 U.S.C. § 798 (1970).

65. *But see* United States v. Marchetti, 466 F.2d 1309, 1316 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), wherein the court states that had there been no contract, the court might have implied such a contract.

The basic provisions of the contract seem unassailable—particularly the requirement that Marchetti submit his manuscript to the CIA for authorization. However, by interpreting the contract to allow the withholding of authorization for all information relating to classified documents, thereby limiting the extent of judicial review of the restraint, the court's ruling arguably is an overbroad restriction of the First Amendment rights of the agent-author.

The court in *Marchetti* de-emphasized the First Amendment protections arising from *New York Times* by stressing the secrecy agreement, finding it a reasonable restriction. This conclusion appears to have been reached without an examination of cases which set the standards for reasonableness of government employment contracts restricting First Amendment rights. The court also implicitly analogizes to private employment contracts, without recognizing the significant differences between private and government employment contracts.

A. Government v. Private Employment Contracts

In *Marchetti* Judge Bryan asserted and Chief Judge Haynsworth implied that the enforcement of this contract is similar to the enforcement of any other employer-employee contract.[66] However, several features actually distinguish government employment contracts from private contracts. First, although the government may limit the speech of its employees more by contract than it could merely by the imposition of criminal sanctions on non-employees, government contracts are nevertheless subject to First Amendment limitations, as the court noted in *Marchetti*.[67] Second, while private employers cannot make unauthorized disclosures a criminal offense, the government can legislate by means of criminal sanctions to protect against disclosure of certain types of information. Thus the government's remedies of both termination of employment and initiation of a criminal proceeding are a stronger deterrent than the private employer's mere right to terminate employment.

Third, the public has a greater right and need to know about the workings of the government than about the working of private enterprise. The CIA, for example, often serves as an unofficial 'ambassador' of the United States in foreign countries, implementing policies of the executive that are or should be subject to public scrutiny. The public must have the opportunity to scrutinize decisions, policies and mistakes of government representatives in order to evaluate the government's efficiency, provided there will be no resulting danger to national security.

66. *See id.* at 1311. See note 18 and accompanying text *supra.*

67. 466 F.2d at 1313.

Thus it would appear that the employment contract is more essential to the private employer, because it is his only remedy for disclosure of secret information, whereas the government has generally chosen to rely on its criminal sanctions to prevent disclosures. Furthermore, protection of public comment on government policy is a major goal of the First Amendment. Consequently, because of the First Amendment, government contracts may not be as broad in scope as private contracts, as the following discussion will demonstrate.

B. Government Employment Contracts

1. *The Standard*

Historically, there were few restrictions on the government's right to contractually limit its employees' First Amendment rights. The old approach was indicated by Justice Holmes when he was a member of the Massachusetts Supreme Court: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[68] However, in 1952, speaking of a New York statute which prohibited the hiring of teachers who advocated the overthrow of the government, the Supreme Court indicated the evolving standard:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system *upon reasonable terms* laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.[69]

The reasonableness test thus enunciated by implication limited the government's contractual powers. The test was applied in *United Public Workers v. Mitchell*,[70] wherein a federal employee faced dismissal for violation of the Hatch Act,[71] which made it unlawful for

68. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892). Justice Holmes' statement is an example of what came to be known as the right-privilege doctrine, which provided that while citizens could constitutionally assert their right to free speech, government employment was a privilege that the government could deny when that citizen's speech was offensive. Subsequent cases indicate that the right-privilege doctrine is no longer applicable: "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374 (1971). *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

69. Adler v. Board of Education, 342 U.S. 485, 492-93 (1952) (citation omitted) (emphasis added).

70. 330 U.S. 75 (1947).

71. 18 U.S.C. § 61(h) (1946), *as amended*, 5 U.S.C. § 7324 (1970).

federal employees to actively participate in political campaigns. Noting that it was Congress' purpose to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service,"[72] the Court stated that the Hatch Act was justifiable because "an actively partisan governmental personnel threatens good administration. . . ."[73] The Court concluded: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."[74] Thus the standard today is that the government may contractually condition government employment upon the surrender of constitutional rights only when the surrender is reasonable in the protection of an important governmental interest.[75]

2. *The Standard Applied*

In *Pickering v. Board of Education*[76] the Court noted the delicate nature of the standard to be applied:

> [T]he theory that employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[77]

72. United Pub. Workers v. Mitchell, 330 U.S. 75, 96-97 (1947). In 1973 the Court stated: "We unhesitantly reaffirm the *Mitchell* holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers." Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 556 (1973).

73. United Pub. Workers v. Mitchell, 330 U.S. 75, 98 (1947).

74. *Id.* at 101.

75. Language in *Letter Carriers* indicates that the reasonableness test remains in effect. The Court stated: "[A]s the Court held in Pickering v. Board of Education, 391 U.S. 563, 568 (1968), the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 564 (1973). *See also* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, Doc. No. 92-82, 92d Cong., 2d Sess., 970-89 (1973).

76. 391 U.S. 563 (1968).

77. *Id.* at 568 (citations omitted).

Pickering, a teacher, was dismissed for writing a letter critical of the local school board. The school board found the letter "detrimental to the efficient operation and administration of the schools of the district."[78] However, the Court noted that Pickering's comments related to "matters of public concern." Since there was no evidence about the effect of his letter, permitting Pickering's dismissal because "the interests of the schools require" was found to be a violation of his First Amendment rights because the efficiency of the school system was not shown to have been impaired.[79]

Furthermore, in *Wieman v. Updegraff*,[80] the Court struck down a loyalty oath which required all state employees to attest that they were not presently, nor had they been for the previous five years, a member of any organization "which has been officially determined by the Attorney General . . . to be a communist front or subversive organization."[81] The Court found that the employee's membership may have been innocent, or the group may not have been subversive at the time of his membership. Consequently this statute violated due process by excluding citizens from public service based on an arbitrary classification of the organization.[82]

In *Shelton v. Tucker*[83] an Arkansas statute which compelled a teacher to file an affidavit listing those organizations to which he belonged within the past five years violated the teacher's right of freedom of association because it went "far beyond what might be justified in the exercise of the State's legitimate inquiry. . . ."[84] The Court noted that the teacher "serves at the absolute will of those to whom the disclosure must be made," because there were no charges made, no notice given, no hearing held and no opportunity to explain permitted.[85] The statute was therefore held to be overbroad because it required disclosure of all associations, including churches and political parties, thereby stifling fundamental liberty.[86]

When the Court held that criminal statutes could prohibit only knowing and active membership in a communist organization,[87] this requirement carried over into employment contracts. In *Elfbrandt v. Russell*[88] an Arizona statute that required an oath that the employee

78. *Id.* at 574.
79. *Id.* at 573-74.
80. 344 U.S. 183 (1952).
81. *Id.* at 186.
82. *Id.* at 190-91.
83. 364 U.S. 479 (1960).
84. *Id.* at 490.
85. *Id.* at 486.
86. *Id.* at 488.
87. Scales v. United States, 367 U.S. 203 (1961).
88. 384 U.S. 11 (1966).

was not a member of the communist party made it a felony to sign the oath if the signer was a member of an organization and knew of its purpose to overthrow the government.[89] This statute was held to be overbroad because it prohibited membership in any organization that had as one of its purposes the overthrow of the government, without requiring a showing of specific intent to overthrow the government.[90] Finally, in *United States v. Robel*[91] the Court struck down the provision of the Subversive Activities Control Act of 1950[92] which made it a crime for members of the communist party to hold positions in defense facilities. The Court noted that the statute forced a prospective employee to choose between the right to hold a job and the right of free association.[93] Consequently the Court held that the statute was overbroad since it was not limited to active members; there was no proof that the individual's membership posed any threat to a governmental interest.[94]

C. Summary

The above cases deal with contracts limiting a First Amendment right which arises at various stages in the course of employment. The standard of reasonableness applies whether the case involves a general prohibition of employment of a certain group of people,[95] an oath during employment which is required in order for the employment to continue,[96] or a termination.[97] Thus the standard of reasonableness will be applied whenever the government seeks to protect an interest by conditioning employment on the surrender of a First Amendment right.[98] In all these cases the government sought to protect either its continued existence or its efficiency.[99] In determining the reasonableness of the employment contracts by balancing the government's interest against the First Amendment freedoms of speech and association, the Court considered the extent to which the government's interests were threatened. The balancing process therefore took into consideration the gravity and imminence of the danger to government security

89. *Id.* at 12-13.
90. *Id.* at 17.
91. 389 U.S. 258 (1967).
92. 64 Stat. 992, 50 U.S.C. § 784(a)(1)(D) (1950).
93. 389 U.S. at 264-65.
94. *Id.* at 265-66.
95. United States v. Robel, 389 U.S. 258 (1967).
96. Elfbrandt v. Russell, 384 U.S. 11 (1966); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952).
97. Pickering v. Board of Education, 391 U.S. 563 (1968).
98. See note 75 *supra*.
99. *See* Note, *Government Information Leaks and the First Amendment*, 64 CALIF. L. REV. 108, 111-12 (1976).

or the extent of the impairment of the efficiency of the governmental agency.[100]

In the loyalty oath cases—where governmental interests in both security and efficiency were involved—the states' statutes were held to be overbroad because government employment would be lost for any form of membership in the Communist party, without requiring that that membership be an active membership manifesting "specific intent to further the illegal aims of the [Communist Party]."[101] In other words, these cases indicate that the Court will not uphold as reasonable a contract which curtails a First Amendment freedom absent a showing of a harmful effect from a government employee's exercise of that freedom. In analyzing the *Marchetti* contract under this standard, the question then becomes whether a sufficiently harmful effect was shown so that it would be reasonable to condition employment on the signing of a contract prohibiting the disclosure of any material relating to a classified document.

In *Marchetti* the court stated that the contract was reasonable "[s]ince information highly sensitive to the conduct of foreign affairs and the national defense was involved . . . ."[102] However, in the loyalty oath cases membership in subversive organizations would seem to present a prima facie case of potential danger to the government or the efficiency of its agencies—particularly as in *Robel* where the party member worked in a defense plant—just as disclosure of classified documents would seem to present a prima facie case of potential danger to national security. Yet in these cases the Court held that the prima facie presentations of danger were not a sufficient showing of a danger, the gravity and imminence of which would be sufficient enough to require a restriction of the employee's First Amendment rights; rather there must be a more definite showing of a danger of sufficient gravity and imminence—knowingly being an active member in an organization whose intent is to overthrow the government.[103] Similarly, it would seem that in order for the CIA to withhold authorization of manuscripts, there should be a more definite showing of danger to national security of sufficient gravity and imminence than the prima facie potential danger from disclosure of classified documents.

100. For example, *Pickering* suggested that termination of employment might be permissible where it was shown that the employee's speech reduced the efficiency of the agency, but the Court found that Pickering's letter did not have that result. 391 U.S. at 572-73.

101. Keyishian v. Board of Regents, 385 U.S. 589, 607 (1967), *citing* Elfbrandt v. Russell, 384 U.S. 11 (1966). *See* United States v. Robel, 389 U.S. 258, 265-66 (1967); Slochower v. Board of Education, 350 U.S. 551 (1956).

102. United States v. Marchetti, 466 F.2d 1309, 1316 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

103. See notes 87-94 and accompanying text *supra*.

Although *New York Times Co. v. United States*[104] did not involve an employment contract, it is still relevant to this question of whether the mere disclosure of classified information is a danger of sufficient gravity and imminence as to permit a curtailment of a First Amendment right. In *New York Times* a plurality of the Court felt that there must be a showing of direct, immediate and irreparable damage in order to restrain speech;[105] a mere showing that a document was classified would not be sufficient when balanced against the First Amendment. A similar conclusion emerges from the criminal cases involving prosecutions for disclosure of classified material—the government must prove that disclosure resulted in damage to national security, and is not allowed to merely show that a classified document was disclosed.[106]

In conclusion, while there appear to be no Supreme Court cases directly involving the government contracting to protect its classified information, several cases point toward the requirement of actual damage to national security before fundamental rights can be curtailed. Thus interpreting the contract so as to prohibit publication of all classified materials did not force the government to prove a nexus between revelation of all classified material and damage to national security. Because damage to national security is the interest involved herein, interpreting Marchetti's contract so as not to require this proof of damage may allow the contract to be overbroad, since some revelations will not necessarily be damaging—for example those which discuss abuses of power, those which reveal embarassing information, and, to a large extent, those which discuss past operations.

III. First Amendment Standards

A. Introduction: Prior Restraint and Subsequent Punishment

In *Marchetti* the court noted that "[o]ne may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure."[107] When there is a criminal penalty for a certain type of speech, the threat of the subsequent punishment will often deter borderline speech that may in actuality be protected by the First Amendment. It is precisely for this reason that the Supreme Court has been so exacting when deciding whether a criminal statute affecting speech is overbroad. Congress cannot, by calling a certain class of speech criminal, automatically eliminate First Amendment considerations. The Court's problem in formulating its First Amendment standards has

104. 403 U.S. 713 (1971). See notes 116-34 and accompanying text *infra*.

105. *See* 403 U.S. at 726 (Brennan, J., concurring); *id.* at 730 (Stewart, J., concurring).

106. See notes 142-56 and accompanying text *infra*.

107. United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1975).

been in determining what level of danger is necessary for speech to be criminal. In 1919 the Court adopted the "clear and present danger" test[108] advocated by Justices Holmes and Brandeis, and this test was applied and modified for the next half-century. In 1969 the Court held that speech may not be punished if it is mere advocacy of eventual criminal action; rather there must be an "incitement to imminent lawless action."[109] As noted in the previous section, whichever test the Court applied, in order to punish speech, the government was required to show an impending danger—a substantive evil—which the speech sought to promote. The requirement of impending danger was present in every test; the variations among the tests involved only the quantum or immediacy of the danger.[110]

Because prior restraints impose a greater danger to freedom of speech than subsequent punishment, there has always been a reluctance to establish such systems.[111] As late as 1967, absolute statements against prior restraints still appeared, such as the statement from *Curtis Publishing Co. v. Butts*: "[W]e have rejected all manner of prior restraint on publication, *Near v. Minnesota*, 283 U.S. 697, despite strong arguments that if the material was unprotected the time of suppression was immaterial."[112]

In citing *Near*, Justice Harlan was probably referring to Chief Justice Hughes' comment that "it has been generally . . . considered that it is the chief purpose of [the First Amendment] to prevent previous restraints upon publication."[113] Actually, however, *Near* is much more often cited as being the first statement by the Court (in dicta) authorizing prior restraints, and then "only in exceptional cases."[114] *Near*'s examples of such permissible restraints are restraint of publication of sailing dates and troop locations in times of war, or of obscenity.[115] Thus the exceptional cases in which prior restraint is permissible require a showing of a greater quantum of danger or a substantial evil of greater imminence than for a criminal prosecution.

108. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenk v. United States, 249 U.S. 47, 52 (1919).

109. Brandenberg v. Ohio, 395 U.S. 444, 449 (1969).

110. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. 252, 262 (1941).

111. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROB. 648, 656-57 (1955).

112. 388 U.S. 130, 149 (1967). *See* 4 W. BLACKSTONE, COMMENTARIES *151, 152.

113. Near v. Minnesota, 283 U.S. 697, 713 (1931).

114. *Id.* at 716.

115. *Id.*

B. New York Times Co. v. United States

In *New York Times Co. v. United States*[116] the Supreme Court restated its historical disapproval of prior restraint of speech and the press: "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."[117] The case arose when *The New York Times* and *The Washington Post* began publishing portions of the "History of United States Decision-Making Process on Viet Nam Policy," known as the Pentagon Papers. Concerned that portions of this document—which has been classified "Top Secret"—would reveal sensitive national security information, the government sought an injunction restraining further publication. The Court held that the government had not sustained its burden of demonstrating the necessity of further restraint of publication.

The concurring justices cited two main reasons for refusing to grant the injunction. The first was the theory of separation of power—establishing the authority and the standards under which the press may be restrained from publishing sensitive material is a legislative duty.[118] Because Congress had not enacted such provisions for the restraint of the press—Justices Douglas and Marshall noted that Congress had specifically chosen not to adopt such measures[119]—the executive branch should not be permitted to persuade the Court to judicially impose such a system of restraint.[120] The second reason was that the government sought the injunction on the claim that revelation of the information would cause "direct, immediate and irreparable damage to [the security of the United States],"[121] but no proof of such imminent harm was advanced by the government. Thus "direct, immediate and irreparable damage to [the security of the United States]" was ac-

116. 403 U.S. 713 (1971).

117. *Id.* at 714.

118. *Id.* at 742.

119. Justice Douglas analyzed the relevant sections of the Espionage Act, examples of which can be found in note 144 *infra*. He observed that three of the eight espionage sections contained the word "publish," that the rejected version of section 793(e) of Title 18 of the United States Code had contained a sanction for publication, but the section enacted did not. Furthermore, he cited section 793. In section 1(b) it states: "Nothing in this Act shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." New York Times Co. v. United States, 403 U.S. 713, 720-21 (1972) (Douglas, J., concurring). *See also id.* at 747 (Marshall, J., concurring); 103 CONG. REC. 10447-50.

120. New York Times Co. v. United States, 403 U.S. 713, 718 (Black, J., concurring); *id.* at 723 (Douglas, J., concurring); *id.* at 740 (White, J., concurring); *id.* at 740-41 (Marshall, J., concurring).

121. *Id.* at 730 (Stewart, J., concurring).

cepted by several of the justices as the standard for those exceptionally dangerous substantive evils which permits a prior restraint. However those justices concluded that the government had not sustained its burden of proving that such damage would result from disclosure of the Pentagon Papers.

The critical votes in the case were those of Justices Stewart and White, the "swing men," who really adopted both arguments of the majority. Each joined the other's concurrence. Justice Stewart conceded that the Constitution gives the executive power over foreign affairs including the protection of secret operations. However, both Congress and the courts have a role to play in the system's checks and balances—Congress in imposing criminal sanctions, and the courts in determining the applicability of those criminal sanctions.[122] Justice Stewart was also concerned that secrecy not become overly extensive or manipulable. After noting that some of the material in the Pentagon Papers would in fact be harmful, he concluded that he must join the majority because "I cannot say that disclosure of any of them will surely result in direct, immediate and irreparable damage to our Nation and its people."[123]

Justice White began his opinion by stating, "I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."[124] He also stated that he felt that some harm might result from further publication. But, because Congress has been satisfied to rely on criminal sanctions, Justice White refused to allow further restraint.[125] Justice White stated that not even the "grave and irreparable damage" standard should be applied, because this standard would be difficult to apply, and by implementing it, the Court would be making a fatal first step toward judicially-imposed restraints of the press.[126] Consequently, Justice White would have required the government to rely on its criminal sanctions.

Justice Harlan wrote the only dissenting opinion which addressed the issues of the case.[127] Finding that "the scope of the judicial function in passing upon the activities of the Executive Branch . . . is very

122. *Id.*

123. *Id.*

124. *Id.* at 730-31 (White, J., concurring).

125. *Id.* at 740.

126. *Id.* at 732-33.

127. Justice Harlan was also concerned with the rapidity with which the case was decided. Since the Pentagon Papers comprised forty-seven volumes, government officials could not review them all in the short period of time allowed. Furthermore, the Court decided the case six days after the petition for certiorari was filed, causing Justice Harlan to comment: "With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases." *Id.* at 753 (Harlan, J., dissenting). See Justice Harlan's chronology of the case, *id.*

narrowly restricted,"[128] Justice Harlan rejected the separation of powers argument propounded by the majority. To him, the executive branch's power to act in foreign affairs should extend to the ability to enforce its classification system.[129] Chief Justice Burger joined in Justice Harlan's opinion, although the Chief Justice seemed more concerned with the haste with which the case was decided.[130] Interestingly, the next to the last paragraph of the Chief Justice's opinion stated: "I should add that I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense."[131] Similarly, Justice Blackmun said that he was "in substantial accord" with that part of Justice White's opinion.[132]

New York Times seems as important to *Marchetti* and *Knopf* for what it did not say, as for what it did say. First, the Court warned that "[*a*]*ny system* of prior restraints of expression comes to this court bearing a heavy burden against its constitutional validity."[133] Thus the First Amendment requires that the CIA must show that the secrecy agreement was properly drafted to protect against a substantive evil. The implicit holding of *New York Times* was that simply showing that the material revealed was classified did not suffice as a showing of an imminent substantive evil, particularly because even material which is properly classified will be desensitized with the passage of time. Second, the legislative branch has not authorized any form of prior restraints, including employment contracts, for the protection of classified documents. Therefore, arguably, absent congressional authorization, the contract's enforceability must hinge upon its usefulness in imple-

128. *Id.* at 756.

129. *Id.* at 757. The checks and balances argument rejected by Harlan was an important consideration for the Senate committee investigating the need for a permanent committee to oversee United States intelligence activities. *See Hearings on S. 317 Before the Committee on Government Operations*, 94th Cong., 2d Sess., 1-12 (1976) (opening statements of the Senators). An argument in opposition to Justice Harlan's position is that because ours is a system of laws and of checks and balances, insofar as Congress has not provided a check on the executive intelligence agencies, where there is an allegation that laws are being violated by the executive branch, the courts have a duty to provide a check on the executive's actions.

130. See note 127 *supra*. Chief Justice Burger was particularly perturbed that the *New York Times* studied the documents for three or four months, and then expected the government to review them in a few weeks. 403 U.S. at 750 (Burger, C.J., dissenting). To Chief Justice Burger, the *Times* was setting itself up as the sole trustee of the public's "right to know." *Id.* at 749. Consequently, because of the undue haste with which the case proceeded, he would have remanded the case to the district court for further proceedings. *Id.* at 752.

131. *Id.* at 759.

132. *Id.* at 759 (Blackmun, J., dissenting).

133. *Id.* at 714 (emphasis added).

menting and enforcing the minimum standard set by *New York Times* for the showing of a substantive evil of sufficient danger to justify a prior restraint, direct and immediate danger to the security of the United States.

Third, in *New York Times* the Court ignored the argument for the operation of the presumption that an official has properly performed his duties. This presumption was a cornerstone of the holding in *Knopf* limiting judicial review. In *New York Times* judicial review was implicitly approved by the concurring justices, and also by Chief Justice Burger and Justice Blackmun, who argued that the Court should remand the case to the district court for further proceedings. Furthermore, Justice Harlan's argument for limited judicial review was based not on the presumption of proper performance of his duties by a government official, but on his deference to the executive branch in foreign affairs.

Fourth, Justice White's argument that the Court should force the executive branch to rely on its criminal sanctions is important. He indicates that a prior restraint would never be available when there exists an appropriate criminal sanction. This argument is significant because Chief Justice Burger and Justice Blackmun appear to agree.

Thus, except for the secrecy agreement in *Marchetti*, *Marchetti* and *New York Times* are extremely similar. Both involved a prior restraint of speech which had no congressional approval. There was an existing criminal sanction[134] under which Marchetti could have been prosecuted, just as there was in *New York Times*. Yet in *New York Times* the prior restraint was not permitted, whereas in *Marchetti*, authorization of nearly twenty per cent of the book was withheld by the CIA. One major distinction is that in *Knopf*, the court allowed the presumption that an official properly performs his duties and with that presumption precluded judicial review of the classified material. In *New York Times*, the presumption might have been applied, but was not. Rather, there was a full judicial review, and the government could not meet the standard set for the quantum of danger necessary to be proven before a prior restraint will be permitted.

C. The Role of the Judiciary

1. *The First Amendment Cases*

Historically the Supreme Court has dictated an active role for the judiciary in protecting First Amendment rights. The courts apply several tests to determine whether a statute or ordinance violates the First Amendment. Safeguarding the fundamental rights of speech and

134. See note 144 *infra*.

press also requires the courts to scrutinize the ideas being expressed in order to determine whether the speech may be punished or restrained. When the government asserts that a governmental interest has or will be harmed by speech, the courts will require that the harm be proven before the speech will be restrained or punished.

The "clear and present danger" cases[135] illustrate the principle that the courts will examine the speech of the defendant in order to determine whether that speech presents a sufficiently dangerous expression of ideas as to justify punishing him for stating those ideas. Similarly, in *Pickering v. Board of Education*,[136] the Court examined the letter written by a teacher and concluded that the letter would not undermine the efficiency of the school system, which was the interst the government sought to protect. In a case involving picketing the Supreme Court summarized the procedure for lower courts to follow: "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."[137]

When a prior restraint of speech or press is involved, the courts are to scrutinize both the restraining process and the material restrained. The obscenity cases have provided an extensive forum for the Supreme Court to develop standards under which a prior restraint may be imposed. Because obscenity is not constitutionally protected speech,[138] the essential determination is whether the material is obscene; if so, it may be restrained. However, to safeguard against the restraint of constitutionally protected speech, the Court has established strict standards scrutinizing the processes under which material is deemed obscene.

In *Freedman v. Maryland*[139] the Court stated its standards for the prior restraint of films.[140] Essential to this restraint was full judicial

135. See note 109 and accompanying text *supra*.

136. 391 U.S. 563 (1968).

137. Thornhill v. Alabama, 310 U.S. 88, 96 (1940), *quoting from* Schneider v. State, 308 U.S. 147, 161, 162 (1939).

138. Roth v. United States, 354 U.S. 476, 485 (1957).

139. 380 U.S. 51 (1965).

140. "First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in Speiser v. Randall, 357 U.S. 513, 526, 'Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.' Second, while the State may require advance submission . . . the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial

review, to discover whether constitutionally protected speech was being restrained. The Court stated its primary reason for stressing independent judicial review:

> Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression.[141]

Many of the above principles can be seen in *New York Times.* Since it involved a prior restraint, judicial review was automatically required. The government had the burden of proving harm to its interest, national security. Each of the justices indicated that he did in fact examine the Pentagon Papers to determine if the manuscript presented a danger to national security. It is clear that the result would not have been the same had the government been able to prove a certain quantum of potential danger to national security; the critical point is that the government had the burden of proof and it was not met.

2. *Injury to National Security*

The main purpose of the presidential system of classification of documents is the protection of national security by protecting information, the revelation of which would cause damage to national security. Executive Order No. 11652[142] revised the classification system to focus on the quantum of damage necessary for each classification. Thus the requirement of "exceptionally grave danger to the national security" was established for the "Top Secret" classification, "serious damage to the national security" for "Secret" and "damage to the national security" for "Confidential."[143]

According to Executive Order No. 11652, then, in order for any information to be classified, there would have to be, at the least, a finding of "damage to the national security." Since the present criminal codes[144] set "injury to the United States or (use) to the advantage of

determination suffices to impose a valid final restraint . . . . [Third], the procedure must also assure a prompt final judicial decision." Freedman v. Maryland, 380 U.S. 51, 58-59 (1965). *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-62 (1975).

141. Freedman v. Maryland, 380 U.S. 51, 57-58 (1965).

142. 3 C.F.R. § 339 (1974).

143. *Id.* at § 340.

144. Section 793(e) of Title 18 is the statute involved in these cases, and was most often cited in *New York Times Co. v. United States*: "Whoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . .

any foreign nation" as the standard for punishment for the disclosure of classified information, the argument continues to be advanced that divulging any classified information must necessarily fall within the criminal standard.[145] The few criminal cases involving prosecutions for the disclosure of damaging information appear completely contrary to the above rationale. These cases indicate that it is not sufficient to show that a classified document has been disclosed; rather the jury must determine that the disclosure would cause injury to the national security or could be used to the benefit of any foreign nation.

The first case, *Gorin v. United States*[146] came before the creation of the present classification system.[147] The defendant contended that his particular act—obtaining information on the activities of the Japanese—could not properly be held to be injurious to the United States or beneficial to a foreign nation. He claimed further that the issue of harm to national security was a question of law. The Supreme Court held that the trial court had properly regarded the issue of harm as a question of fact for the jury, thus approving the judge's instruction to the jury that "[w]hether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury."[148]

The creation of the classification system did not lead to a presumption that revelation of classified documents automatically establishes the requisite showing of harm to national security. To the con-

[s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 793(e) (1970). Contrast this with section 798(a) of Title 18: "Whoever knowingly and willfully communicates . . . or *publishes* or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government . . . any classified information . . . concerning the communication intelligence activities of the United States or any foreign government; or obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such process [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 798(a) (1970).

145. *See* S.1, 94th Cong., 1st Sess. § 1124 (1975), which reads: "A person is guilty of an offense, if, being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant, he communicates such information to a person who is not authorized to receive it."

146. 312 U.S. 19 (1941).

147. Gorin was prosecuted under the Espionage Act of June 15, 1917, 50 U.S.C. §§ 31, 32, 34, 36, *repealed and reenacted*, 18 U.S.C. §§ 793-99 (1970), which made it a crime to enter certain areas to obtain national defense information, and also to copy or photograph that information. The act required "intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign nation."

148. Gorin v. United States, 312 U.S. 19, 31 (1941).

trary, the exact instruction given in *Gorin*—this time in reference to a prosecution under section 793 of Title 18 of the United States Code[149]—was approved twenty-one years later by the Second Circuit Court of Appeals in *United States v. Soblen*.[150] In *Soblen* there was testimony that certain personnel and their functions within the O.S.S. were classified information.[151] In determining whether the defendant had violated the statute, the jury was allowed to consider the testimony that the information was classified. Nevertheless, the fact that classified information was involved did not alter the need for the government to prove damage to national security, as evidenced by the trial judge's statement:

> It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.[152]

The most recent case, *United States v. Drummond*,[153] applies these principles most clearly. The court of appeals stated: "*The government acknowledges* that it was for the jury to decide whether the documents defendant conspired to transmit were of such a character [relating to national security]."[154] The jury was shown documents with the classification on the heading. The important aspect of this case is the approval of the trial judge's instruction to the jury that "[w]hether any given document relates to the national defense of the United States is a question of fact for you to decide. It is not a question of how they were marked."[155]

One conclusion to be drawn from *Gorin*, *Soblen* and *Drummond* is that the question of damage to national security is to be determined by the trier of fact. Because the criminal cases involved post-publication sanctions, any damage to national security would have already occurred. Consequently the government would have to prove the damage beyond a reasonable doubt. In a civil proceeding for an injunction, the damage is still speculative; therefore the government is required to prove prospective damage only by a preponderance of the evidence.

The other important conclusion from the criminal cases is that simply showing that material which has been divulged was classified does not sustain the government's burden of proof of damage to national se-

149. See note 144 *supra*.
150. 301 F.2d 236, 239 n.2 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).
151. *Id.*
152. *Id.*
153. 354 F.2d 132 (2d Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966).
154. *Id.* at 151 (emphasis added).
155. *Id.* at 152.

curity. Thus, communication of classified information is not in itself a substantive evil of sufficient magnitude to cause the application of a criminal statute. The government must prove that disclosure of the information actually would cause damage to national security. As noted previously, because prior restraints are a more powerful remedy than criminal penalties the standard for the application of a prior restraint requires proof of a larger quantum or imminence of danger. Thus for the CIA to restrain publication of Marchetti's book its required proof of damage must be stricter than proof for a criminal prosecution ("injury to national security"). Arguably this stricter standard might be the standard which the government itself suggested in *New York Times*: direct, immediate and irreparable damage to national security.[156]

IV. Balancing the Presumptions

A contract which imposes a prior restraint on speech appears to contain an inherent contradiction—valid contracts are presumed enforceable, yet prior restraints are presumed unenforceable. Overemphasizing one presumption unduly minimizes the other. The court in *Marchetti* stressed the contract theory, thereby permitting one man's freedom of speech and the country's right to learn certain information to be sacrificed to a contract that sought to protect secret information. However, by overemphasizing the First Amendment the prior restraint would not be permitted, possibly resulting in the disclosure of truly harmful secret information. A more careful balancing of the two theories will protect both of these competing interests from being unduly minimized.

First, neither the presumption of the enforceability of a valid contract nor the presumption against prior restraints is an absolute presumption. Although contracts with valuable consideration are generally enforceable, one exception is that courts will not enforce contracts wherein the government seeks to restrain the speech or press of its employees unless the restraint is a reasonable means to protect the government's interest.[157] In Marchetti's case, the interest to be protected was national security. The question of reasonableness arises in determining the extent to which the government must be required to show prospective damage to national security before a contract restricting speech may be enforced. Analyzing the case fom the First Amendment perspective, prior restraints are presumed invalid but an excep-

156. *See* New York Times Co. v. United States, 403 U.S. 713, 732 n.2 (1971) (White, J., concurring), wherein Justice White notes that the government's briefs suggested the standard of grave and irreparable damage.

157. See notes 68-94 and accompanying text *supra*.

tion involving national crises has been recognized. Again the crucial issue involves the quantum of danger to national security that the government must show before the prior restraint is permissible.

A proper balancing approach could result in a definition of the quantum of danger which fits the exceptions of both presumptions. This standard would necessarily be more strict than to permit restraint merely because an item is classified, and less strict than to require a showing of "direct, immediate and irreparable harm to national security." Balancing therefore sustains the presumptive validity of the contract, but does not permit that contract to be overly broad. At the same time, the general prohibition against prior restraints is upheld, while permitting a specified class of exceptions.

The *Marchetti* contract can easily be interpreted to reach that balance. Although in paragraph three of the contract Marchetti promised not to publish or reveal *any* classified information,[158] in paragraph one he stated that he is familiar with the provisions of the espionage laws.[159] Considering these two provisions together, the contract may be interpreted as a promise not to reveal information which is "damaging to national security." This is the definition of material which is *properly* classified "Confidential" and whose revelation could result in prosecution under section 793(e) of Title 18 of the United States Code;[160] this should therefore be the quantum of danger necessary to justify a prior restraint under Marchetti's contract.

While the above standard seems to be the result actually reached by the court in *Marchetti*, there is one crucial distinction: the government will be required to *prove* that the release of the information will cause damage to national security. Merely showing that the information was classified will not suffice as proof of damage, just as it was not sufficient in the criminal cases.[161] Requiring the government to prove damage to national security incorporates one of the underlying assumptions of *New York Times*: the passage of time desensitizes classified material.[162] Thus, much like the material in the Pentagon Papers, CIA information which is properly classifiable may no longer be damaging after the operation is over.

The court in *Marchetti* did not consider the effect of the passage of time from the classification because it relied on a third presumption,

158. See notes 2, 144 *supra.*

159. *Id.*

160. See note 144 *supra.*

161. See notes 142-56 and accompanying text *supra.*

162. The Freedom of Information Act, 5 U.S.C. § 552 (1970), *as amended* 5 U.S.C. §§ 552, 552a (Supp. V, 1975), supports this general conclusion by providing for declassification of classified materials after certain periods of time. Material classified by the CIA, however, is specifically exempted from the declassification process. 5 U.S.C. § 552(b)(1)(A) (Supp. V, 1975).

the presumption that a government official properly performs his duties. As noted earlier, this presumption was not applied in *New York Times*. Far more importantly, this presumption had never previously been permitted to sustain the decision of a censoring body, nor to permit the burden of proof to be shifted to one asserting First Amendment rights. In all of its First Amendment cases, the Supreme Court has demanded that the judicial branch have an active role in an independent determination of the need to abridge a First Amendment right. Finally, despite the fact that this presumption had never been applied before, the *Marchetti* court not only applied it, but it was elevated to the status of a conclusive presumption. The presumption arose immediately upon the CIA's showing that the material was classified; Marchetti was not given an opportunity to prove that revelation of the material would not cause damage to national security.

Insofar as this presumption is inconsistent with the First Amendment, it must be greatly de-emphasized in any balancing approach. The presumption might properly be applied when the publication concerns present or prospective operations, but even in those instances the author should be permitted to offer evidence that revelation of the information will not cause damage to national security. Given the CIA's control over most of the information, the author should be able to rebut the presumption by showing by a preponderance of the evidence that damage to national security will not ensue from the revelation. Furthermore, in extreme situations, the author should be permitted to offer evidence that the public's right to know the information outweighs the presumed damage. In such cases the CIA would have to offer its evidence of the prospective damage. Should such instances arise, the author should have the burden of proving by clear and convincing evidence that the information should be revealed despite the prospective damage.

In those instances where the material sought to be published concerns operations which have been completed, the presumption would not operate.[163] Because the operation has been completed, the CIA will now have the burden of proving that publication of the information will cause damage to national security. In considering the question of damage, the court should consider evidence of, *inter alia*, the possibility that the revelations could endanger lives, jeopardize dealings with other countries, or impair or inhibit intelligence sources. Among those fac-

163. The question of whether an operation has been completed may itself become an issue. In light of the increased role of the judiciary suggested herein, this should not be an insurmountable problem. Since a ruling that an operation has been completed will simply compel the CIA to come forward with evidence that the revelation will cause damage, close issues of whether the operation has been completed should be resolved in the author's favor.

tors which might weigh favorably for the author are whether the material sought to be published discusses general plans, tactics and activities, or actual specifics, and whether the material discusses operations that seem to be blatantly illegal.[164] Due to the historical presumption against prior restraints, the fact that the standard has been lowered to "damage to national security," and the fact that the CIA controls information tightly, the CIA should be required to meet the burden of proving damage to national security by clear and convincing evidence.

The balancing approach outlined above goes far beyond *Marchetti* in prohibiting the CIA from restraining speech, but still falls far short of *New York Times*. The basic approach has been an attempt to accomplish what the contract would logically be permitted to do—force the author to submit the manuscript prior to publication, and permit the restraint of damaging information. One result of this balancing approach will be to require much more work from the court in the determination of damage to national security. Included in the increased role of the judiciary is a greater leeway to consider damaged diplomatic relations as damage to national security, but also leeway to consider the public's right to know. This more significant role for the judiciary seems entirely consistent with all historical attempts to impose prior restraints on expression.

V. Conclusion

A reasonable contract to protect critical secret intelligence sources and methods would be a most useful tool in protecting national security. The effective gathering of intelligence information requires that the CIA be able to protect sensitive information. However, the present system, which permits too much material to be classified,[165] has shown us that over-classification can provide the CIA with the opportunity to hide its abuses of power under the cloak of secrecy. To the extent that the interpretation of the CIA contract was overly broad and an unreasonable restraint on Marchetti's freedom of expression and the

164. It would not, of course, be the function of the court to determine the legality of CIA operations. However, recent revelations concerning covert activities indicate that at least some of them were blatantly illegal. *See* SELECT COMMITTEE REPORT, *supra* note 6. There seems to be no reason that the court could not take notice of such illegality.

165. The *New York Times* reports that William G. Florence, a retired Pentagon security officer, testified before the Foreign Operations and Government Information Subcommittee that only "one to five per cent [of currently classified documents] 'must legitimately be guarded in the national interest.'" Schlessinger, *The Secrecy Dilemma*, N.Y. Times, Feb. 6, 1972, § 6 (Magazine), at 12. *See* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 275 (1971) ("Government frequently withholds more and for longer than it has to. Officials, of course, tend to resolve doubts in favor of nondisclosure.").

country's right to know, that interpretation of the contract was guilty of fostering the secrecy syndrome.[166]

However, when the proper standard—requiring a reasonable interpretation of the contract—is maintained, the government's interest can be better preserved. Secrecy is then no longer the end to be protected, but the means for protecting national security. The Pentagon Papers were released, albeit without government approval. Classified documents were not protected simply for secrecy's sake, no apparent damage has resulted, and the American public—recipient of the information—became better informed. Presumably, knowledge that errors and abuses of power will not forever be obscured under a secrecy classification will have a deterrent effect on future abuses.

When classified information is sought to be published in the future, the *only* question should be, "Will it damage national security?" If the only potential damage is to our intelligence organizations, they are surely large and well established enough to absorb a shock to the secrecy system without adverse effects. It seems far less certain that our system of government can continue to absorb the shock of instances where secrecy has permitted illegal covert operations, only to have later revelations show both the illegal activity and the part which secrecy played in allowing the illegal activities to continue. Thus the deterrent effect of reporting illegalities, the Congress' and the public's right to know, and the author's freedom of expression combine to compel the conclusion that a contract should not be permitted to protect secrecy in the absence of proof of danger to national security. To otherwise condone the exhaltation of secrecy in the name of national security is to ignore the warning of the late Chief Justice Earl Warren:

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.[167]

166. President Ford proposed that many agencies which deal with classified information include a secrecy agreement in their employment contracts. Los Angeles Times, Feb. 19, 1976, at 1, col. 5.

167. United States v. Robel, 389 U.S. 258, 264 (1967).